(4)

No. 94-889

Supreme Court, U.S.
FILED
FEB 27 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

IBJ SCHRODER BANK & TRUST COMPANY,
Trustee, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, Conservator for
FRANKLIN SAVINGS ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ANDREW E. TOMBACK
Deputy General Counsel

MARK P. HILEMAN
Assistant General Counsel

BRUCE C. TAYLOR
Counsel
Resolution Trust Corporation
Washington, D.C. 20006

BEST AVAILABLE COPY

15pp

QUESTIONS PRESENTED

1. Whether the court of appeals engaged in improper fact finding.

2. Whether the court of appeals erred in finding that the RTC's Board of Directors delegated the decision to repudiate burdensome contracts to its Director of Resolutions and Operations.

3. Whether the RTC's ratification of the Director of Resolutions and Operations' repudiation decision conflicts with *FEC* v. *NRA Political Victory Fund*, 115 S. Ct. 537 (1994).

4. Whether court of appeals lacked jurisdiction over the RTC's appeal because the agency failed to obtain authorization from the Solicitor General to appeal.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Brock v. *Pierce County*, 476 U.S. 253 (1986)	6
California v. *Taylor*, 353 U.S. 553 (1957)	10
Duignan v. *United States*, 274 U.S. 195 (1927)	10
FEC v. *NRA Political Victory Fund*, 115 S. Ct. 537 (1994)	7, 9
J.W. Hampton, Jr. & Co. v. *United States*, 276 U.S. 394 (1928)	5
LTV Educ. Sys., Inc. v. *Bell*, 862 F.2d 1168 (5th Cir. 1989)	5
Lancaster Glass Corp. v. *Philips ECG, Inc.*, 835 F.2d 652 (6th Cir. 1987)	4-5
Law v. *Cross*, 66 U.S. (1 Black) 533 (1862)	6-7
Lawn v. *United States*, 355 U.S. 339 (1958)	10
Lopez-Telles v. *INS*, 564 F.2d 1302 (9th Cir. 1977)	6
Missouri v. *Jenkins*, 495 U.S. 33 (1990)	8
Mistretta v. *United States*, 488 U.S. 361 (1989)	5
Schweicker v. *Hansen*, 450 U.S. 785 (1981)	5
United States v. *Caceres*, 440 U.S. 741 (1979)	5
United States v. *Emerson*, 846 F.2d 541 (9th Cir. 1988)	6
United States v. *Gemmill*, 535 F.2d 1145 (9th Cir.), cert. denied, 429 U.S. 982 (1976)	6
United States v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961)	5

Cases—Continued: Page

United States v. *Providence Journal Co.*, 485 U.S. 693 (1988) 9
United States v. *True*, 946 F.2d 682 (9th Cir. 1991) 6
Youakim v. *Miller*, 425 U.S. 231 (1976) 10

Statutes, regulations, and rules:

Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. 1811 *et seq.*:
12 U.S.C. 1821(e) (Supp. V 1993) 3
12 U.S.C. 1821(e)(1) (Supp. V 1993) 2-3, 6
12 U.S.C. 1441(b)(4) 3
28 U.S.C. 516 9
28 U.S.C. 518(a) 7, 9
28 U.S.C. 519 9
28 U.S.C. 2101(c) 8
28 C.F.R. Section 0.20(a) 7
Sup. Ct. R.:
Rule 13.1 8
Rule 13.3 8
Rule 15.7 8

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-889

IBJ SCHRODER BANK & TRUST COMPANY,
Trustee, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, Conservator for
FRANKLIN SAVINGS ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 26 F.3d 370. The October 13, 1992, opinion and order of the district court (Pet. App. 17a-38a) is reported at 803 F. Supp. 878. The October 20, 1992, judgment of the district court (Pet. App. 39a-40a) is unreported. The July 22, 1993, opinion and order of the district court (Pet. App. 41a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1994. Petitions for rehearing were denied on August 17, 1994, and August 19, 1994. Pet. App. 15a-16a. The petition for a writ of certiorari was filed on November 15, 1994. The supplemental brief in support of the petition for a writ of certiorari was filed on December 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Franklin Savings Association (Franklin) issued zero coupon bonds in December, 1984. For net proceeds of less than $65 million, Franklin committed itself to pay interest rates ranging from 11% to 11.75% for a period of up to 40 years, compounding to a total repayment obligation of $2.9 billion. Pet. App. 4a-5a.

In February, 1990, the Office of Thrift Supervision appointed the Resolution Trust Corporation (RTC) as conservator for Franklin. By this time, interest rates had dropped substantially. William Roelle, then the Director of Resolutions and Operations at the RTC, who was in charge of the Corporation's conservatorship operations, concluded that repudiating the bonds early would realize in excess of $140 million in savings for the conservatorship. Pet. App. 30a-31a. Roelle thus found that continued payments of the bonds "was a clear cut burdensome contract" (C.A. App. 1098a-1099a), and pursuant to the RTC's authority to repudiate burdensome contracts under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), 12 U.S.C.

1821(e)(1) (Supp. V 1993), the RTC repudiated the bond indenture and offered to pay the bonds off early.[1]

2. The Trustee under the bond indenture and a group of bondholders challenged the validity of the repudiation decision in the United States District Court for the Southern District of New York. The parties filed cross-motions for summary judgment, later converted at the suggestion of the district court into written submissions in lieu of a trial. C.A. App. 802a-803a. No factual disputes existed and no live testimony was heard. Pet. App. 45a.

The district court, in interpreting the written record, concluded that the RTC's Board of Directors did not delegate to Roelle the authority to repudiate burdensome contracts. Pet. App. 36a. The court thus held that Roelle's repudiation of the bonds was invalid. *Id.* at 38a.

Immediately after the district court's ruling, the Chief Executive Officer of the RTC (the statutory successor to the RTC Board of Directors) formally ratified Roelle's repudiation decision. Pet. App. 45a-46a. The district court refused to consider the ratification, however, because it occurred after judgment had been entered. *Id.* at 56a-57a.

---

[1] 12 U.S.C. 1821(e)(1) (Supp. V 1993), which applies to the RTC pursuant to 12 U.S.C. 1441(b)(4), provides that the conservator or receiver for an insured depository institution may, within a "reasonable period" following its appointment, "disaffirm or repudiate any contract or lease" to which the institution is a party, if the conservator or receiver determines, in its discretion, that the contract or lease is "burdensome" and that disaffirmance or repudiation "will promote the orderly administration of the institution's affairs." The statute contains no directive regarding who at the agency must make that determination.

3. The court of appeals reversed. The court noted that the RTC's delegation of the decision to repudiate burdensome contracts was a matter of internal agency organization, and that the RTC had the authority to choose the manner in which it exercised its powers. Pet. App. 12a-13a. The court then held that the RTC intended Roelle to have the authority to repudiate contracts. *Id.* at 12a, citing the RTC's support for Roelle's action in its answer and complaint filed in response to petitioners' action, and its conscious failure to take any action inconsistent with Roelle's determination. *Id.* at 13a. The court found it unnecessary to consider the impact of the formal ratification of Roelle's decision. *Ibid.*

ARGUMENT

1. Petitioners argue (Pet. 14-18) that the court of appeals engaged in impermissible factfinding.

Contrary to petitioners' contention, the court of appeals in this case engaged in no fact-finding. There were no factual disputes before the district court, and no live testimony was heard. The record compiled by the district court was entirely written. The court of appeals analyzed that written record, and drew legal conclusions and inferences that were contrary to those drawn by the district court. The court of appeals examined the pleadings of the parties, the RTC's bylaws, and the document delegating authority from the RTC Board of Directors to Roelle, and concluded that the Board of Directors intended Roelle to have the power to repudiate contracts. Pet. App. 12a. In making its ruling, the court of appeals thus correctly did not consider evidence outside of the record, and made no factual findings. See *Lancaster Glass Corp.*

v. *Philips ECG, Inc.*, 835 F.2d 652, 658 (6th Cir. 1987). It is entirely proper for a reviewing court to make "an independent determination as to the legal conclusions and inferences which should be drawn from" a lower court's written record. *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). See also *LTV Educ. Sys., Inc.* v. *Bell*, 862 F.2d 1168, 1172 (5th Cir. 1989).

2. Petitioners also contend (Pet. 18-25) that the court of appeals' conclusion that the RTC delegated authority to Roelle to make repudiation decisions creates a conflict among the circuits.

As petitioners themselves concede in their supplemental brief, no other court has considered the issue presented in this case: whether the RTC Director of Resolutions and Operations has been delegated the authority to repudiate burdensome contracts. See Pet. Supp. Br. 8. Although petitioners dispute the informal method by which the Board of Directors delegated the power to repudiate contracts to Roelle, internal agency delegation processes do not create enforceable rights that permit third parties to challenge the validity of agency action in the absence of a conflict with the requirements of a statutory mandate or published regulation. *Schweiker* v. *Hansen*, 450 U.S. 785, 789-790 (1981) (per curiam); *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979); *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 405 (1928). See also *Mistretta* v. *United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

FIRREA contains no requirement or restriction regarding the RTC's repudiation authority, other than the directives that the RTC determine, in its discretion, that the contract is burdensome and that its repudiation would promote the orderly administration

of the conservatorship. See 12 U.S.C. 1821(e)(1) (Supp. V 1993). The RTC's Board of Directors authorized the Director of Resolutions and Operations to make that determination. Pet. App. 12a. That internal agency decision was neither prohibited by statute nor contrary to a published regulation. Its validity therefore is not judicially reviewable at the behest of third parties.[2]

Furthermore, even if petitioners were correct that Roelle did not initially have authority to make the repudiation decision, the RTC's subsequent adoption of Roelle's decision would negate any internal procedural flaw. Pet. App. 13a. See *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986) ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action."); see also *Law* v. *Cross*, 66

---

[2] The authorities cited by petitioners as conflicting with the decision of the court of appeals all involve other governmental entities that failed to comply with explicit statutory or regulatory provisions. See *Lopez-Telles* v. *INS*, 564 F.2d 1302, 1304 (9th Cir. 1977) (immigration judges are without discretionary authority to countermand the decisions of the INS to prosecute aliens); *United States* v. *Emerson*, 846 F.2d 541, 546-548 (9th Cir. 1988) (the DEA was without authority to schedule a drug as a controlled substance, because the applicable statute expressly authorized the Attorney General to make such determinations, which could be delegated only through published regulations); *United States* v. *True*, 946 F.2d 682 (9th Cir. 1991) (forest ranger acted contrary to a published regulation); *United States* v. *Gemmill*, 535 F.2d 1145 (9th Cir.), cert. denied, 429 U.S. 982 (1976) (same). In contrast, FIRREA prescribes no procedure for repudiation decisions, but grants general repudiation authority to the RTC, retaining in the corporation the power to decide who can make the substantive repudiation decision.

U.S. (1 Black) 533, 539-540 (1862) (principal can ratify the unauthorized act of an agent).

3. Petitioners argue in their supplemental brief (Supp. Pet. Br. 5-7) that the court of appeals' finding that the RTC ratified Roelle's repudiation decision conflicts with *FEC* v. *NRA Political Victory Fund*, 115 S. Ct. 537, 539 (1994).

In *NRA*, 115 S. Ct. at 539, the Federal Election Commission (FEC) filed a petition for certiorari without the prior authorization of the Solicitor General. The Solicitor General subsequently authorized the petition after the ninety-day period for filing a petition had elapsed. *Ibid.* This Court held that the FEC was not empowered to file a petition for certiorari without the Solicitor General's authorization, and, because that authorization came after the filing period had expired, the petition was untimely. *Id.* at 539-543.

In the present case, the court of appeals stated that it was not relying on the FTC's ratification of Roelle's decision in making its ruling. Pet. App. 13a-14a ("Because we so hold, we need not consider the merits of the district court's rejection of [the] RTC's post-judgment formal ratification of Roelle's acts."). Thus, *NRA* has no bearing on the ruling below. Furthermore, the situation in *NRA* was different from that in the present case in two fundamental ways. In *NRA* the requirement of Solicitor General authorization of the agency's petition for certiorari was statutorily imposed. See 28 U.S.C. 518(a); 28 C.F.R. 0.20(a). In contrast, FIRREA contains no provision regarding who at the RTC has the authority to make repudiation decisions. In addition, in *NRA*, the Solicitor General's authorization came after the juris-

dictional filing period had expired. The Court held that the authorization therefore "came too late in the day to be effective." 115 S. Ct. at 543. There is no similar allegation that the ratification of Roelle's decision was untimely.

4. Petitioners also contend in their supplemental brief (Pet. Supp. Br. 2-4) that, under *NRA*, the court of appeals had no jurisdiction because the RTC failed to obtain the approval of the Solicitor General before filing its notice of appeal. That argument is untimely and not appropriate for this Court's review in this case.

A supplemental brief, filed while a petition for certiorari is pending, may be filed after the jurisdictional 90-day period for filing a certiorari petition has expired.[3] Supreme Court Rule 15.7 restricts such a brief to "calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing." It is doubtful whether new grounds for seeking certiorari can ever be presented in a supplemental brief filed after the time to petition has expired. Certainly, petitioners may not use such a brief to advance arguments that were available to them at the time the petition for certiorari was filed.

The grounds for seeking certiorari advanced by petitioners in their supplemental brief were available

---

[3] 28 U.S.C. 2101(c) provides that a petition for certiorari must be filed within 90 days after entry of final judgment by the court of appeals. That "90-day limit is mandatory and jurisdictional." *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990). See also Sup. Ct. R. 13.1, 13.3. The court of appeals here denied petitioners' motion for rehearing on August 17, 1994. Petitioners filed their supplemental petition on December 28, 1994, more than 130 days after the court of appeals' final ruling.

when they filed the petition for certiorari. *NRA* did not create new law relevant to this case, but applied legal principles clearly set forth in *United States* v. *Providence Journal Co.*, 485 U.S. 693, 700 (1988). See *NRA*, 115 S. Ct. at 540. In *Providence Journal*, the Court held that, unless Congress "exempt[s] litigation from the otherwise blanket coverage of [28 U.S.C. 518(a)]," 485 U.S. at 705 n.9, cases before the Supreme Court "must be conducted and argued * * * by the Solicitor General or his designee." *Providence Journal*, 485 U.S. at 700. Applying that ruling in *NRA*, this Court held that, because Congress failed to exempt the FEC from 28 U.S.C. 518(a), the FEC was not entitled to file a petition for certiorari without Solicitor General authorization. *NRA*, 115 S. Ct. at 541-542. *NRA* stated no new principle regarding either the effect of an appeal taken without legal authorization or the interpretation of statutes conferring litigating authority on federal agencies. In addition, *NRA* concerned authority of federal agencies to litigate in this Court under 28 U.S.C. 518(a), not authority to pursue litigation in the lower courts under different statutory provisions applicable to that issue. See 28 U.S.C. 516, 519. The *NRA* decision therefore did not recognize any new principle relevant to the grounds for certiorari raised in petitioners' supplemental brief.[4]

---

[4] *NRA*, 115 S. Ct. at 543, also held that the Solicitor General could not authorize a petition for certiorari after the filing period had expired. Petitioners do not contend, however, that the Solicitor General attempted to ratify the appeal in this case. Any new principle about the retroactive effect of an authorization announced in *NRA* would thus be inapplicable to the arguments petitioners seek to raise.

In any event, petitioners' new claim was not raised below, and this Court rarely grants certiorari to decide "questions not raised or resolved in the lower court." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). See *Lawn* v. *United States*, 355 U.S. 339, 362-363 (1958); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). Indeed we are aware of no federal court that has considered whether the RTC has the authority to appeal adverse judgments in district courts without the authorization of the Solicitor General. In the absence, not only of a circuit conflict, but of any lower court examination of the issue, this Court's review is plainly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

ANDREW E. TOMBACK
Deputy General Counsel

MARK P. HILEMAN
Assistant General Counsel

BRUCE C. TAYLOR
Counsel
Resolution Trust Corporation
Washington, D.C. 20006

FEBRUARY 1995

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20050